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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/609,083	06/27/2003	James R. O'Brien	170933-00003	7446

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EXAMINER

GARCIA, ERNESTO

ART UNIT	PAPER NUMBER
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3679

DATE MAILED: 12/08/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/609,083

Applicant(s)

O'BRIEN, JAMES R.

Examiner

Ernesto Garcia

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 June 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 03 November 2003 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☒ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Drawings

The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference sign(s) mentioned in the description: "70" as indicated on page 11 in line 14 and "72" as indicated on page 11 in line 22. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the examiner does not accept the changes, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Objections

Claims 1, 3, 6 and 9 are objected to because of the following informalities:
regarding claim 1, "respective" in line 5 should be deleted, the first occurrence of "the" in line 6 should be --a-- as "a fastening" has not been previously recited, --being--

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should be inserted before "spaced-apart", and the second occurrence of "the" in line 16 should be --an--;

regarding claim 3, "the" in line 3 should be --an--;

regarding claim 6, "comprising" in line 3 should be --consisting-- to comply with proper Markush claim language; and,

regarding claim 9, applicant should consider labeling the rail as a first rail and a second rail in line 4 in order to provide proper antecedent basis to lines 9-10.

Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-8 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claim 1, the metes and bounds of the claim is unclear. Applicant states that the gate is able to rack due to the rails being pivotally secured to the posts. However, the limitation "the rails are restricted from pivoting from the pickets by an opposing fastening on the second picket" in lines 15-17 suggest that the rails are not rackable relative to the pickets. Since the rails do not rack relative to the pickets due to

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the restriction, how can the gate be rackable. Therefore, applicant needs to clarify whether the rails are restricted or rackable without any restrictions.

Regarding claims 2-8, the claims depend from claim 1 and therefore are indefinite..

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3-9 and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Cusack, 3,067,985 (see marked-up attachment).

Regarding claim 1, Cusack discloses, in Figures 1 and 6, a rackable gate comprising a gate panel **10**, a spaced-apart rails **16,18**, spaced-apart first pickets **32**, a second picket **32** (of all the pickets shown one picket can be grouped as a second picket), and a pair of opposing gate posts **12,14**. The panel **10** has the spaced-apart rails **16,18** connected to the first pickets **32**. The second picket **32** is fastened to the spaced-apart rails **16,18** on a side **A5** opposing a fastening **42** of the first pickets **32** to the spaced-apart rails **16,18**. The gate posts **12,14** each define openings **48** in a side

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wall **A9**. The openings **48** are spaced-apart and conform to the spacing of the spaced-apart rails **16,18**. The openings **48** receive distal opposing distal ends **A10** of the spaced-apart rails **16,18** pivotally secure thereat.

Applicant is reminded that the functional "whereby" statement does not define any structure and accordingly cannot serve to distinguish. *In re Mason*, 114 USPQ 127, 44 CCPA 937 (1957).

Regarding claims 3, 5 and 7, the gate panel **10** is selectively racked during installation between about 0 degree and 20 degrees relative to an angle at which the spaced-apart rails **16,18** are disposed when the spaced-apart rails **16,18**, the first pickets **32**, and the second picket **32** are initially attached together.

Regarding claim 4, the spaced-apart rails **16,18** are disposed between about 0 degrees and 60 degrees.

Regarding claim 6, an angle at which the spaced-apart rails **16,18** are disposed is 0 degrees, 20 degrees, 40 degrees, and 60 degrees.

Regarding claim 8, the spaced-apart rails **16,18** are four-wall tubular members.

Regarding claim 9, Cusack discloses, in Figures 1, 2 and 6, a rackable gate comprising a pair of elongate rails **16,18**, first pickets **32**, a second picket **32**, and opposing gate posts **12,14**. The rails **16,18** comprise a first rail **16** and a second rail **18** each disposed in parallel spaced-apart relation and at an angle relative to horizontal. The rails **16,18** each define an opposing first side edge **A11** and a opposing second side edge **A12**. The first pickets **32** are attached to the first rail **16** and the second rail **18** by fasteners **42** between the first pickets **32** and the opposing first side edge **A11** of the rails **16,18**. The second picket **32** is attached to the first rail **16** and the second rail **18** by fasteners **42** between the second picket **32** and the opposing second side edge **A12** of the spaced-apart rails **16,18**. The gate posts **12,14** define openings **48** in which the distal ends **A10** of the rails **16,18** are pivotally secured.

Applicant is reminded that the functional "whereby" statement does not define any structure and accordingly cannot serve to distinguish. *In re Mason*, 114 USPQ 127, 44 CCPA 937 (1957).

Regarding claim 14, given the structure as indicated in claim 9 above, the method of making the gate is inherent. Therefore, the method comprises:

(a) dispose a first rail parallel and spaced-apart from a second rail at an angle to a horizontal plane to define a longitudinal length of a fence panel, the rails defining opposing first and second side edges;

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(b) attach a plurality of first pickets to the rails substantially perpendicular to the horizontal plane with fasteners between the pickets and the first side edge of the rails;

(c) attach a second picket at end portions of the rails substantially perpendicular to the horizontal plane by fasteners between the second picket and the second side edge of the rails; and

(d) pivotally secure distal ends of the rails in openings defined in opposing posts, The gate, being racked by moving the opposing posts in opposing directions transverse to the longitudinal axis of the rails, conforms the slope of the rails substantially to the slope of the portion of the terrain by changing the angle between the pickets and the rails while the pickets remain substantially perpendicular to horizontal. Applicant is reminded that the functional "whereby" statement does not define any structure and accordingly cannot serve to distinguish. *In re Mason*, 114 USPQ 127, 44 CCPA 937 (1957).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2 and 9-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Applicant's admitted prior art in view of Cusack, 3,067,985.

Regarding claim 1, Applicant has admitted Figure 6 as prior art that the rackable gate comprises a gate panel, spaced-apart rails, spaced apart first pickets, and a second picket (of all the pickets shown one picket can be grouped as a second picket). The gate panel has the spaced-apart rails connected to the first pickets. The second picket **32** is fastened to the rails on a side opposing a fastening (the weld) of the first pickets to the rails.

However, applicant has not disclosed as prior art that the rackable gate comprises a pair of opposing gate posts each defining openings in a side wall; the openings being spaced-apart to conform to the spacing of the rails; and the openings receive distal opposing distal ends of the rails pivotally secured thereat. Cusack teaches, in Figure 6, a rackable gate comprising a pair of opposing gate posts **12,14** each defining openings **48** in a sidewall in order to make an adjustable fence (see col. 1, lines 9-10). The openings **48** are spaced-apart and conform to a spacing of rails **16,18**, and the openings **48** receive distal opposing distal ends of the rails pivotally secured thereat. Therefore, as taught by Cusack, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include the pair of opposing gate posts to make an adjustable fence.

Regarding claim 2, the fastening comprises flexible mild steel welds.

Regarding claim 9, Applicant has admitted as prior art, Fig. 6, a rackable gate comprising a pair of elongate rails, first pickets, and a second picket (of all the pickets shown one picket can be grouped as a second picket). The rails comprise a first rail and a second rail each disposed in parallel spaced-apart relation and at an angle relative to horizontal. The rails each define an opposing first side edge and a opposing second side edge. The first pickets are attached to the first rail and the second rail by fasteners between the first pickets and the opposing first side edge of the rails. The second picket is attached to the first rail and the second rail by fasteners (the welds) between the second picket and the opposing second side edge of the spaced-apart rails.

However, applicant has not disclosed as prior art that the rackable gate comprises a pair of opposing gate posts each defining openings in a side wall; the openings being spaced-apart to conform to the spacing of the rails; and the openings receive distal opposing distal ends of the rails pivotally secured thereat. Cusack teaches, in Figure 6, a rackable gate comprising a pair of opposing gate posts **12,14** each defining openings **48** in a sidewall in order to make an adjustable fence (see col. 1, lines 9-10). The openings **48** are spaced-apart and conform to a spacing of rails **16,18**, and the openings **48** receive distal opposing distal ends of the rails pivotally secured thereat. Therefore, as taught by Cusack, it would have been obvious to one of

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ordinary skill in the art at the time the invention was made to include the pair of opposing gate posts to make an adjustable fence.

Applicant is reminded that the functional "whereby" statement does not define any structure and accordingly cannot serve to distinguish. *In re Mason*, 114 USPQ 127, 44 CCPA 937 (1957).

Regarding claim 10, the fasteners comprise flexible mild steel welds.

Regarding claim 11, the angle at which the rails are disposed is between about 0 degrees and 60 degrees.

Regarding claim 12, the gate panel is selectively racked during installation between about 0 degrees and 20 degrees relative to the angle at which the rails are disposed when the rails and pickets are initially attached together.

Regarding claim 13, the rails are four-wall tubular members.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernesto Garcia whose telephone number is 703-308-

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8606. The examiner can normally be reached from 9:30-6:00. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9326 for regular communications and 703-872-9327 for After Final communications.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on 703-308-2686. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1113.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

EJ.

E.G.

November 30, 2004

Attachment: one marked-up copy of Cusack, 3,067,985.

Daniel P Stodola

DANIEL P. STODOLA
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3600

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(Cusack) 3,067,985

